

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel W.A.
DREW EDMONDSON, et al.

PLAINTIFF

v.

CASE NO.: 05-CV-00329 TCK-SAJ

TYSON FOODS, INC., et al

DEFENDANTS

**DEFENDANT COBB-VANTRESS, INC.'S SUPPLEMENTAL
BRIEF IN SUPPORT OF FIRST MOTION TO COMPEL DISCOVERY**

COMES NOW Defendant Cobb-Vantress, Inc. ("Cobb-Vantress") by and through its attorneys and submits the following Supplemental Brief in Support of First Motion to Compel Discovery for the purpose of informing the Court of recent developments relevant to the issues before the Court pursuant to Cobb-Vantress' First Motion to Compel Discovery (Dkt. No. 743).

I. INTRODUCTION AND PROCEDURAL HISTORY

Before the Court pursuant to Cobb-Vantress' First Motion to Compel Discovery (Dkt. No. 743) is the issue, among others, of the discoverability of the results of environmental sampling conducted by the State and its experts in the Illinois River Watershed ("IRW"). Cobb-Vantress asserts that the results of environmental testing constitute facts which the State must disclose pursuant to Cobb-Vantress' First Set of Interrogatories and Requests for Production of Documents ("Cobb-Vantress' First Set of Discovery.") *See generally*, First Mot. to Compel (Dkt. No. 743); Reply in Suppt. of First Mot. to Compel (Dkt. No. 824). The State has refused to disclose the results of such testing under a claim that such facts constitute attorney "work product, deserving *the highest degree of protection*." (Pls. Resp. in Opp'n to First Mot. to Compel, p. 8.)

II. RECENT DEVELOPMENTS

Recent actions taken by the State are inconsistent with its position that the results of environmental sampling in the IRW by its experts are protected from disclosure as attorney work product. This Court should take these actions into account in determining whether the State is justified in continuing to withhold the information sought by Cobb-Vantress in its First Set of Discovery.

A. The State Has Demanded that *Defendants* Disclose Information Regarding Environmental Sampling and the Results of Such Sampling.

On July 10, 2006, the State served Cobb-Vantress and the other defendants with a set of Requests for Production. (Ex. A, State of Oklahoma’s July 10, 2006 Set of Requests for Production to Cobb-Vantress.)¹ Many of those requests seek to compel Cobb-Vantress and the other defendants to disclose information and documents relating to “testing” conducted in the IRW.

In Request Nos. 120 – 123, the State seeks to discover “all documents and materials referring to or relating to the *testing or analysis* performed by or on behalf of you on” *soils, surface waters, ground waters or edge-of-field run-off* from lands located within the IRW. (Ex. A, RFP Nos. 120-123, pp. 26-27 (emphasis added)). These Requests for Production expressly target information known to or documents created by Cobb-Vantress’ “*consultants, experts and investigators.*” (Ex. A, Def. No. 1, p. 2.)² Cobb-Vantress sought this same information from the

¹ Cobb-Vantress’ responses to these Requests for Production are not yet due. Accordingly, as of the filing of this pleading, Cobb-Vantress has neither produced documents responsive to these requests nor objected to the production of responsive documents.

² The State has defined the term “You” for these Requests for Production as Cobb-Vantress, Inc. and “its present and former officers, executives, directors, agents, servants, employees, *attorneys*, insurance carriers, *consultants, experts, investigators* and other persons or firms acting or purporting to act on its behalf.” *Id.*

State in its First Set of Discovery. The State objected claiming that such information constituted protected “work-product” and refused to disclose the same. (*See* Ex. B to Mot. to Compel, Dkt. No. 743, Responses to Interrog. No. 1 and RFP No. 1, pp. 3-7.)

In Request Nos. 7 and 8, the State seeks to discover the results of any “analyses, testing [or] investigation” . . . of the “composition or constituents of” *poultry litter* conducted by Cobb-Vantress. (Ex. A, RFP Nos. 7 and 8, p. 4.) Again, Cobb-Vantress sought this same information from the State in its First Set of Discovery. The State objected claiming that such information constituted protected “work-product” and refused to disclose the same. (*See* Ex. B to Mot. to Compel, Dkt. No. 743, Response to Interrog. No. 1, pp. 3-5.)

In Request Nos. 18, 19 and 20, the State seeks to discover documents relating to “efforts undertaken” to “evaluate and/or quantify any environmental effects” from the release of “poultry litter (or any constituents thereof)” (Ex. A, RFP Nos. 18-20, pp. 6-7.) Cobb-Vantress sought similar information from the State in its First Set of Discovery. The State again objected claiming that such information constituted protected “work-product” and refused to disclose the same. (*See* Ex. B to Mot. to Compel, Dkt. No. 743, Response to RFP Nos. 2 and 3, pp. 7-10.)

Requesting that Cobb-Vantress disclose the information and documents sought by the State in the Requests for Production discussed above is fundamentally inconsistent with the State’s claim that such information or documents constitute opinion work product which is to be afforded the highest degree of protection from discovery. The State cannot have it both ways and should not be permitted to take such diametrically-opposed positions regarding the discoverability of the results of environmental sampling and/or investigations by the parties and their experts in the IRW.

B. The State's Offer to Disclose Environmental Sampling Results to Non-Parties Evinces a Lack of Confidentiality.

Given the vigor with which the State has resisted disclosing *to the defendants in this case*, the results of environmental sampling conducted by the State's experts in the IRW, Cobb-Vantress was surprised to learn that the State has recently offered to make such disclosures to *non-parties*. For the past few months, the State's attorneys and two of the expert consulting firms identified on the State's privilege log as the custodians of sampling records being withheld from Cobb-Vantress in this case – Camp Dresser & McKee, Inc. and Lithochimeia, Inc. – have been contacting poultry farmers and other property owners in the IRW and requesting access to their properties for the purpose of conducting environmental testing.³ Attached hereto as Exhibit B, is a copy of the “Access Agreement Form” being used by the State's attorneys and experts to gain access to properties in the IRW for the purpose of sampling surface water, water wells, springs, seeps, groundwater, soils and sediments. Under this agreement, the State has offered to disclose to these landowners in the IRW “the results of any sampling on your property.” (Ex. B., p. 1)

The State's willingness to disclose to non-parties the results of environmental sampling conducted by their experts in the IRW confirms the unprotected nature of such basic, factual information. The State's conduct reveals that its plea to this Court to afford the “highest degree of protection” to such information is nothing more than a ploy to deprive Cobb-Vantress and the other defendants in this case of information which even the State and its experts do not view as protected work product. In light of the fact that the State has no intent to maintain this type of

³ So long as the State is maintaining its claim in this action that these poultry growers are the “agents” of the Poultry Integrator Defendants, Cobb-Vantress is compelled to note the impropriety of contacts by attorneys or agents representing the State in this lawsuit with poultry growers. Such contacts are clearly unethical and impermissible under Rules 4.2 and 4.3 of the Oklahoma Rules of Professional Conduct.

information as privileged or even confidential in its dealings with non-parties, that same information cannot be shielded from party discovery.

III. CONCLUSION

For the foregoing reasons and those set forth in the First Motion to Compel (Dkt. No. 743) and the Reply in Support of the First Motion to Compel (Dkt. No. 824), Cobb-Vantress respectfully requests that its First Motion to Compel be granted and for all other relief to which it is properly entitled.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of August 2006, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants.

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